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January 30, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 16, 2008

Case Number: TSO-0674

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter "the Individual") for access authorization. This decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's application for access authorization should be restored.¹ For the reasons detailed below, it is my decision that the Individual's access authorization request should be restored.²

I. APPLICABLE REGULATIONS

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." Under Part 710, the Department of Energy (DOE) may suspend an individual's access authorization where "information is received that raises a question concerning an individual's continued access authorization eligibility." 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual's eligibility to hold an access authorization has been raised, the burden shifts to the individual to prove that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." *See* 10 C.F.R. § 710.27(a). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. 10 C.F.R. § 710.7(a).

¹ Access authorization (or security clearance) is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

² Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996 are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

II. BACKGROUND

The Individual is an employee at a DOE facility. In July 2001, as part of the process for obtaining a security clearance, the Individual signed a Security Acknowledgment form (Security Acknowledgment) in which she certified that she understood that involvement with illegal drugs could result in the loss of her security clearance. In December 2001, the Individual was granted a security clearance. On two separate occasions between August 2001 and May 2002, the Individual, while in college, used marijuana. Both occasions involved a marijuana cigarette being passed around at a party and the Individual took one puff on each occasion. Ex. 9 at 16-19.

As part of a routine reinvestigation, the individual completed a Questionnaire for National Security Positions on December 6, 2006 (12/06 QNSP).³ In the 12/06 QNSP, the Individual listed her two uses of marijuana during the period between August 2001 and May 2002. In an attempt to resolve the derogatory information regarding her use of marijuana, the local security office (LSO) conducted a personnel security interview (PSI) with the Individual on May 21, 2008.

Because the PSI failed to resolve the derogatory information, the Individual's security clearance was suspended and the LSO requested an administrative review regarding the Individual's clearance. Subsequently, the Individual was issued a notification letter on July 30, 2008 (Notification Letter). In the Notification Letter, the Individual was informed that her use of marijuana constituted derogatory information under 10 C.F.R. § 710.8(k) (Criterion K). The Notification Letter also asserted that the Individual's use of illegal drugs while holding a security clearance constituted derogatory information under 10 C.F.R. § 710.8(l) (Criterion L).⁴ The Individual's use of marijuana after signing the Security Acknowledgment form and her use of marijuana while knowing that DOE barred the use of illegal drugs by its clearance holders were also cited as Criterion L derogatory information.

A hearing was held in this matter. At the hearing, DOE did not present witnesses. The Individual offered her own testimony, as well as that of her mother, three co-workers (Co-Workers 1, 2 and 3), her brother, her boyfriend and her manager. The DOE submitted 10 exhibits (Exs. 1-10) for the record. The Individual submitted four exhibits (Ind. Exs. A-D).

III. FACTUAL FINDINGS

The facts in this case are essentially not in dispute. A brief summary is provided below.

The Individual became a summer intern at the DOE facility in August 2001 while attending a university. Hearing Transcript (Tr.) at 129. As part of the process to obtain a security clearance,

³ The Individual completed an electronic form of the Questionnaire for National Security Positions, entitled Electronic Questionnaire for Investigations Processing, or e-QIP.

⁴ Criterion K refers to information indicating that an individual has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances . . . (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.)." 10 C.F.R. § 710.8(k). Criterion L references information indicating that an individual is "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy. . . ." 10 C.F.R. § 710.8(l).

the Individual signed a Security Acknowledgment form in July 2001. Tr. at 133; Exhibit 6. In signing the form, the Individual certified that she understood that any involvement with illegal drugs could result in loss of her access authorization. Ex. 6. In December 2001, the Individual was granted a security clearance. Ex. 9 at 34. Between August 2001 to May 2002, while attending college, the Individual used marijuana on two occasions, both social events where a marijuana cigarette (i.e., a joint) was being passed around by others. Ex. 9 at 17-18. At both times, the Individual took one puff of a marijuana cigarette. Ex. 9 at 18-19.

In June 2002, upon graduation, the Individual was employed at the DOE facility. Tr. at 130. The Individual was selected for a special educational program at the facility and, in the fall of 2003, attended another university to earn a master's degree. Tr. at 131. After obtaining her master's degree the Individual returned to full-time employment at the DOE facility in 2004. Tr. at 131.

As part of a routine reinvestigation concerning her security clearance, the Individual was asked to complete the 12/06 QNSP in December 2006. Ex. 7. In completing the 12/06 QNSP, the Individual answered "Yes" to question numbers 24a and 24b, which asked if the individual had in the last seven years used an illegal drug and asked if she had ever used an illegal drug while possessing a security clearance. Ex. 7 at 25.

IV. HEARING TESTIMONY

A. Individual's Mother

The Individual's mother speaks to the Individual two to four times a day. Tr. at 19. When asked about the Individual's reliability and trustworthiness, she testified that the Individual at 13 years of age would be trusted, in her absence, to care and provide activities for her siblings, as well as to clean their house. Tr. at 20-21. She also testified to the Individual's dedication in her care of her aunt's children. Tr. at 21-22. As a further example of the Individual's trustworthiness and reliability, she testified that the Individual has been assisting her aunt in caring for her ill uncle by baking breads and cakes and delivering them to the aunt's bed and breakfast for the past two months. Tr. at 22-23. In college, the Individual assisted a classmate who had become pregnant by caring for the baby while the mother completed college. She did this despite going to college full-time and having a part-time job. Tr. at 23-24. The Individual's mother also testified that the Individual later managed one of her rental properties and was so meticulous in doing so that she provided a computer readout of all expenses and income associated with the property. Tr. at 24-25.

The Individual's mother also testified as to the Individual's honesty. In this regard she recalled an incident where the Individual, while in high school, wrecked the family car. She took the car to a mechanic, arranged for it to be repaired, and paid for the repair by giving her parents \$100 every two weeks until the expense was repaid. Tr. at 25-26. When the Individual was asked about the accident, she told her parents that the accident was her responsibility. Tr. at 26. She also testified that she believed the Individual's account of the circumstances and extent of her marijuana use. Tr. at 26. She also testified that the Individual now spends most of her time with her family and her current boyfriend. Tr. at 27.

B. Co-Worker 1

Co-Worker 1 started working with the Individual in the summer of 2002. Tr. at 34. He recalled that the Individual, after leaving to attend graduate school, came back to her position in August 2004. Tr. at 34. He further recalled that the Individual moved to her current position at the DOE facility in October or November 2006. Tr. at 34. During the period he worked with her, Co-Worker 1 had daily contact with the Individual. Tr. at 34. He would care for the Individual's dog when she was out of town – approximately two or three times a month. Tr. at 35. He has been impressed by the Individual's honesty. Tr. at 35. In regard to the Individual's honesty, reliability and trustworthiness, Co-Worker 1 testified to an incident at work where the Individual discovered a potential vulnerability concerning a security system and immediately made a rapid decision to contact managers in two different departments to resolve the vulnerability. Tr. at 40-41. During the occasions he has gone to the Individual's house to pick up her dog, he has never noticed any drug paraphernalia or alcohol in her home. Tr. at 42.

C. Co-Worker 2

Co-Worker 2 has known the Individual since June 2002, when the Individual became a full-time employee at the facility. Tr. at 53. For a year afterward, they saw each other on a daily basis and became friends. Tr. at 53-54. Despite the Individual's leaving for a year to get a graduate degree, Co-Worker 2 and the Individual have maintained their friendship. Tr. at 54. Currently they meet several times a month to go to such activities as going out to lunch or dinner, getting a pedicure, bowling, going to "happy-hour" with other co-workers or playing poker. Tr. at 54. She testified that she observes the Individual associating primarily with other co-workers. She has not observed the Individual associating with individuals that she knew from high school or college. Tr. at 54-55. Co-Worker 2 has never observed the Individual to appear intoxicated or under the influence of any substance. Tr. at 55. Co-Worker 2 believes that the Individual is trustworthy and honest and has observed nothing in the six years she has known her that would cause her to change her opinion. Tr. at 62. At work, the Individual has never been afraid to ask for assistance and has always been very honest regarding areas where she did not feel she had sufficient knowledge. Tr. at 56. The Individual has always given Co-Worker 2 very candid and honest answers to her questions, including those involving career and life issues. Tr. at 57-58.

D. Individual's Brother

The Individual's brother testified that he lived with the Individual for five years, from August 1998 through August 2003. Tr. at 65. He testified that, in his opinion, the Individual was very trustworthy and a person whom "you know will always be there, through thick and thin." Tr. at 66. During the period they lived together, he had never observed behavior in the Individual that would cause him to believe that she had been using illegal drugs. Tr. at 67. He testified that, while attending a party at a friend's house in the fall of 2000, the Individual asked if they could leave since she was not comfortable with illegal drug use. Tr. at 67-68. He also remembered another incident where they were hosting a party at their residence. Some of their guests had brought uninvited guests. During the party, some individuals had gone into the backyard and were smoking marijuana. The Individual asked her brother to go to the backyard and ask the

smokers to leave. The Individual's brother was reluctant to ask, so the Individual herself went to the backyard and asked the marijuana users to leave. Tr. at 68-69.

E. Current Boyfriend

The Individual's current boyfriend testified that he has been the Individual's boyfriend for five years. Tr. at 76. Although they live in different states, he speaks to the Individual multiple times a day and they visit each other every other weekend. Tr. at 76. The boyfriend believes that the Individual is "maybe the most reliable person I know." Tr. at 77. Since they have been together, the boyfriend has never seen the Individual use illegal drugs. Tr. at 78. He has never seen the Individual under the influence of alcohol or illegal drugs nor has he ever attended a party with the Individual where illegal drugs were used. Tr. at 78.

F. Co-Worker 3

Co-Worker 3 testified that he works with the Individual in her current position at the DOE facility. Tr. at 82. He initially met the Individual when he was on the panel that evaluated candidates for the Individual's current position. Tr. at 82-83. He has worked closely with the Individual on a special project. Tr. at 85. In his opinion, the Individual is a reliable and trustworthy person. Tr. 85-86. He also believes, based on his interactions with the Individual at work, that the Individual is "very, very honest." Tr. at 86. He testified that he has spoken to members of the Individual's family and that her reputation among her family members is that she is "super honest." Tr. at 86-87. He also believes that the Individual, in the two years he has worked with her, has never exhibited poor judgment. Tr. at 104-05. Co-Worker 3, despite having been informed about the Individual's two prior uses of marijuana and the Individual's use of marijuana after signing a Security Acknowledgment form, still believes that the Individual is an honest, reliable and trustworthy person. Tr. at 88. When asked why he held this opinion, Co-Worker 3 cited the Individual's youth at the time of her marijuana use and the fact that she has left a high school/college culture and now works in a "different culture" where the importance of security issues are stressed. Tr. at 89, 95.

G. Manager

The Individual's current Manager testified that he has known the Individual for two years. Before hiring the Individual, as is his practice with all new hires, he read the Individual's personnel security file. Tr. at 116. At work, the Manager has frequent contact each day with the Individual. Tr. at 107. The only contact the Manager has with the Individual outside of work is at the annual Christmas party, which she has attended along with his other employees. Tr. 107. Her work performance has been outstanding, and she has made a significant contribution on a national security project. Tr. at 107-08. As a result of that performance, the Individual was detailed to another city for a period. Tr. at 108. The Individual, as all employees on official travel, was given a per-diem allowance of over \$50, for which a receipt was not required. Tr. at 110. The Individual, however, only sought to claim approximately \$15 per day, thus returning some \$3,000 to the U.S. Treasury. Tr. at 110. The Manager, even after being informed of the Individual's two prior uses of marijuana and her use despite signing a Security Acknowledgment form, testified that he still had the same level of trust in the Individual's honesty, reliability and judgment. Tr. at 112. He believes that the Individual made a "youthful error in judgment" but it

did not undermine his confidence in her reliability and her dedication to national security. Tr. at 113. The conduct reflected a “blip” rather than a continuing behavior pattern. Tr. at 113.

The Manager further testified that he found it significant that the Individual self-reported her prior marijuana use after passing a polygraph examination for her current position.⁵ Tr. at 114, 116. This was significant because there was no impending polygraph examination to “urge” the Individual to tell the truth. Tr. at 116-17.

H. The Individual

The Individual testified that after graduating from high school and while going to college, she obtained an internship at a DOE facility in 2001. The Individual graduated from college in 2002. Tr. at 126, 128-29. In 2003, after working for a year at the DOE facility, she was sponsored by the facility to earn a master’s degree at a university in a different state. She completed the degree program in one year. Tr. at 131. After earning her master’s degree, she returned to her position at the DOE facility. Tr. at 131. After working for a couple of years, she applied for and was hired for her current position at the facility. Tr. at 131.

With regard to prior marijuana use, the Individual accepts full responsibility for both incidents. Tr. at 133. She described the last time she used marijuana in 2002. She was at a friend’s house, a friend with whom she was infatuated with and had dated. Her friend began to flirt with another woman at the party and both then smoked a marijuana cigarette that was being passed around at the party. Because she feared being “left out” of the company of her friend, and that her friend was paying more attention to the other woman, she took a puff of the marijuana cigarette. Tr. at 135, 147; *see* Ex. 9 at 16-17. The Individual stated that her use was an impulsive decision based on emotion. Tr. at 148. Immediately after taking the puff, she realized she should not be involved with marijuana, and she has not had any involvement with illegal drugs since then. Tr. at 135. She fully realizes it was a bad decision both to use the marijuana and to have used it after signing a Security Acknowledgment form. Tr. at 135-36.

Since the marijuana use incidents, the Individual believes that she has matured. When she used marijuana, she was 21 years old; as of the date of the hearing she is 28. Tr. at 151. She has tried to learn from her mistakes because “I want to be a credible person, I want to be a good person.” Tr. at 152. Further, given her current position, she has gained an increased sensitivity to security policies and concerns. Tr. at 147-48, 152. With regard to this increased sensitivity, the Individual testified

You know, now when I -- any time I'm going to do anything, I certainly think about the consequences and think about how it's going to impact not just myself, but, you know, everyone around me, my responsibilities to [the DOE facility] and to the Department of Energy.

Tr. at 153. She believes now that she is more mature she would never let a situation occur that involved marijuana. Tr. at 148. Further, because she has been forthcoming concerning her prior marijuana use, she does not believe that she could be coerced by anyone. Tr. at 149.

⁵ There was no question in the polygraph examination relating to illegal drug use. Ex. 10 at 49.

She no longer has any contact with the people she associated with on the two occasions where she used marijuana. Tr. at 136. Her closest friends and the people she spends most of her time with now are her family and her current boyfriend. Tr. at 136-37. She also spends time with her friends from her current position at the DOE facility. Tr. at 137.

V. ANALYSIS

A. Criterion K

As mentioned above, the Criterion K concerns arise from the Individual's past use of marijuana. The LSO had sufficient grounds to invoke Criterion K given the Individual's admitted use of marijuana. The use of an illegal drug, such as marijuana, raises questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules and regulations. *See, e.g., Personnel Security Decision*, Case No. TSO-0658 (2008).

In the present case, after considering the evidence, I find that the Individual has resolved the security concerns raised by her prior use of marijuana. The nature of her use was limited to two isolated occasions. Further, this use occurred over six years ago. More importantly, it occurred while the Individual was young, when she was 21 years of age. During this time, she was in college as an undergraduate. I find that the Individual's youth at the time when she used the marijuana is a mitigating factor regarding the Criterion K concern. Also significant is the fact that the Individual no longer associates with the individuals who were involved with the two prior incidents of marijuana use. The convincing testimony of the Individual's brother, friends, co-workers and boyfriend indicates that there has been no evidence of illegal drug use in the past six years since her use of marijuana in 2001-2002. I also find, based on the credible testimony of the Individual, that she has matured since these incidents and has fully internalized the necessity of avoiding all involvement with illegal drugs. Consequently, I find that the Individual has resolved all of the Criterion K concerns.

B. Criterion L

The Criterion L derogatory information centers on the fact that the Individual, in July 2001, signed a Security Acknowledgment form certifying that she understood that any involvement with illegal drugs could result in the loss of her security clearance. Additionally, the Individual, despite having been granted a security clearance, chose to use marijuana even though she knew that security clearance holders were not permitted to use illegal drugs. The Individual's use of illegal drugs while holding a security clearance raises a security concern as to her honesty, reliability, and trustworthiness.

With regard to the Criterion L derogatory information, I find that the Individual has resolved the security concerns. As discussed in the previous section, the predicate actions that form the basis of the Criterion L concerns, the Individual's prior marijuana use, was limited to two isolated instances that occurred some six years ago. Further, the Individual was only 21 years old when these incidents occurred. The Individual has also distanced herself from the people associated with her prior drug use. While the Individual showed poor judgment regarding her two uses of

marijuana, the Individual did answer accurately and forthrightly when asked about her prior illegal drug use in the 12/06 QNSP. The Individual has presented credible witnesses attesting to her fundamental honesty and reliability both at work and in her personal life. Her credible testimony also supports a finding that the Individual has matured in the past six years and now has an increased dedication to scrupulously honor all security requirements. I find no other evidence in the record that indicates that the Individual has exercised poor judgment or has demonstrated significant honesty or reliability problems.⁶ After considering all of the record, I find that the Individual has resolved the Criterion L concerns.

VI. CONCLUSION

As explained above, I find that the security concerns under Criteria K and L related to the Individual's use marijuana, use of marijuana while holding a security clearance, and use of marijuana after signing a Security Acknowledgment form have been resolved. I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Consequently, the Individual's access authorization application should be restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Richard A. Cronin, Jr.
Hearing Officer
Office of Hearings and Appeals

Date: January 30, 2009

⁶ The DOE presented, as an exhibit, a redacted copy of the Individual's Office of Personnel Management (OPM) file. Ex. 10. The Office of Personnel Management (OPM) investigator who interviewed the Individual as part of a 2008 investigation reported in his interview notes that he found that the Individual had a "difficult time" answering questions concerning illegal drug use and took no responsibility for her illegal drug use and poor judgment. Ex. 10 at 55. He also noted the Individual's poor judgment in failing to immediately report her marijuana use to the LSO. In an earlier 2007 investigation of the Individual, he reports that there were posters throughout the facility providing notice of such reporting requirements. Ex. 10 at 63. After having an opportunity to hear the Individual's live testimony, I find the OPM investigator's impressions to be outweighed by the other evidence in the record. With regard to the OPM Investigator's assertion that the Individual had an affirmative duty to immediately report her illegal drug use, I note that this alleged duty was not cited as derogatory information in the Notification Letter. The Individual has submitted copies of various reporting requirement posters and documents used at the facility time of the interview and before. Individual Exhibits A-D. None states a immediate reporting requirement regarding illegal drug use. Consequently, I find that the evidence presented by the Individual greatly outweighs the unfavorable information presented in the OPM investigator's report.

